IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 28 of 2007
With
SECOND APPEAL No. 29 of 2007

For Approval and Signature:
HONOURABLE **MS. JUSTICE R.M.DOSHIT**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to Civil judge ?

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PATEL RANCHHODBHAI SHIVRAMBHAI - Appellant(s)

Versus

HARIBHAI SHANKARDAS PATEL & 1 - Defendant(s)

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Appearance :
MR MAHENDRA K PATEL for Appellant
MR BHARAT JANI for Defendant(s) : 1,
None for Defendant(s) : 2,
NOTICE SERVED for Defendant(s) : 2.2.1, 2.2.2, 2.2.3,2.2.4

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT
29th August, 2007

COMMON JUDGMENT

*H*eard the learned advocates. With the consent of the learned advocates, the Appeals are heard and

decided on the following substantial questions of law.

[1] Whether in view of the finding of right to use the suit land by the plaintiff in Regular Civil Suit No. 32 of 1995, the lower appellate court has materially erred in dismissing the suit in *toto* and in not allowing the suit to the extent of the finding of permissive user recorded in favour of the plaintiff.

[2] Whether the learned Additional District Judge has committed material illegality in holding that the plaintiffs in Regular Civil Suit No. 40 of 1995 had a right to withdraw permission to use the open land conferred upon the defendants-purchasers.

The subject matter of these two Appeals is the suit land admeasuring 17' x 12' lying West to the plots no. 1 & 2 owned by the appellants in Second Appeal No. 28 of 2007 and a 3' strip of land on the south of the plots nos. 1 & 2 and 3 & 4 owned by the appellants and respondent no.2 in Second Appeal No. 28 of 2007.

The respondent no.1 in Second Appeal No. 28 of 2007-Haribhai Shankarbhai Patel, owned a piece of land bearing Village Site No. 252, situated at village-Khorasam, Taluka-Chanasma. The said Haribhai Patel, by registered sale deeds dated 4th July, 1969

[*Exhs. 71 & 80*] sold sub-plots nos. 1 & 2 to the appellant in Second Appeal No. 28 and one sub-plot to the respondent no.2 in the said Second Appeal. Under the terms and conditions of the said sale, the purchasers - the aforesaid appellant and the respondent no.2 – were permitted to use the suit land as open land to store the agricultural equipments. The 3 ft. wide strip of land to the south of the said sub-plots was to be used for discharge of water. It appears that in or around the year 1995, the said Haribhai attempted to raise construction in the suit land and the appellant in these appeals intended to use the said strip of land for personal purpose. The appellant, therefore, instituted Regular Civil Suit NO. 32 of 1995 in the Court of learned Civil Judge [JD], Chanasma against the said Haribhai and one another for declaration of title over the suit land and for permanent injunction restraining the defendants from obstructing the plaintiff's user of the suit land. The said suit was contested by the said Haribhai by written statement *Exh.17*. The said Haribhai denied the allegations made by the plaintiff. He denied that the plaintiff had a right,

title or interest over the suit land. Although he did admit that under the sale deed *Exh.71*, the plaintiff had been given the right to use the suit land. But, according to the said Haribhai, he had the right to withdraw the said condition of sale. The learned Civil Judge, by judgment and order dated 26th April, 2002 upheld the right of the plaintiff to use the suit land. The learned Civil Judge proceeded further to hold that the plaintiff had become the owner of the suit land by adverse possession. In view of the said findings, the learned Civil Judge allowed the suit and passed decree for declaration of title and permanent injunction against the defendants.

Feeling aggrieved, the said Haribhai Patel, the defendant no.1, preferred Regular Civil Appeal No. 37 of 2002 [*re-numbered as Regular Civil Appeal No. 171 of 2002*] in the Court of learned Additional District Judge, Patan. The learned Addl. District Judge, Patan, by judgment and order dated 23rd June, 2006, observed that the plaintiff had the right to use the suit land under the sale deed Exh.71 but had no title over the suit land. In view of the said finding, the learned Additional District Judge

allowed the Appeal, set-aside the decree passed by the learned Civil Judge and dismissed the suit. Feeling aggrieved, the plaintiff has preferred the above Second Appeal No. 28 of 2007.

The said Haribhai Patel and others instituted Regular Civil Suit No. 40 of 1995 in the Court of learned Civil Judge [JD], Chanasma against the aforesaid purchasers of the sub-plots no. 1 to 4 for declaration that the said defendants had no right to use the suit land [*land* 17' x 12'] and that they had no right over the suit strip of land except for discharge of water. The said suit was contested by both the defendants by written statement Exhs. 16 & 24. The learned Civil Judge by judgment and order dated 26th April, 2002 recorded finding in favour of the defendants and dismissed the suit against the plaintiffs. Feeling aggrieved, the said plaintiffs preferred Regular Civil Appeal No. 38 of 2002 [*re-numbered as Regular Civil Appeal No. 172 of 2002*] in the Court of learned Additional District Judge, Patan. The learned Additional District Judge, by judgment and order dated 23rd June, 2006 allowed the said appeal and decreed the suit in favour of the

plaintiffs. The learned Additional District Judge issued injunction to the effect that the defendants had no right over the 3 ft. strip of land, except for discharge of water and that the right to use the suit land was cancelled. The learned Additional District Judge was pleased to hold that the plaintiffs who had conferred the right to use the suit land under the respective sale deed also had a right to cancel the same. Feeling aggrieved, the defendant no.1 has preferred the Second Appeal No. 29 of 2007.

The sale of sub-plots nos. 1 & 2 and 3 & 4 to the respective purchaser is not in dispute. It is also not in dispute that under the respective sale deed, both the purchasers had been given right to use the suit land as open land to store agricultural equipments. The sale deeds are also specific in respect of the user of 3 ft. strip of land for discharge of water. The lower appellate Court having upheld the aforesaid right conferred upon the respective purchaser, has erred in holding that the vendor had the right to cancel or withdraw from the said condition. Both these appeals, therefore, deserve to be allowed to the extent the express right

to use the suit land and right to discharge water through the 3' wide land are concerned.

Both these appeals are, therefore, allowed. The *impugned* order dated 23rd June, 2002 passed by the learned Additional District Judge, Patan in Regular Civil Appeal No. 171 of 2002 is modified to the effect that the said appeal is *partly* allowed. The judgment and decree passed by the learned Civil Judge [JD], Chanasma in Regular Civil Suit No. 32 of 1995 is *quashed* and *set-aside* to the extent the learned Civil Judge upheld the title of the plaintiff in respect of the suit land. The decree passed in respect of permanent *injunction* restraining the defendant no.1 from interfering with the plaintiff's right to use the suit land as open land to store the agricultural equipments is confirmed. The decree be drawn accordingly. The parties shall bear their own cost.

The impugned judgment and order dated 23rd June, 2006 of the learned Additional District Judge, Patan passed in Regular Civil Appeal No. 172 of 2002 in respect of the suit land [17' x 12'] is quashed and set-aside. The order in respect of right to discharge

water through 3 ft. land to the West is confirmed. The decree be drawn accordingly. The parties shall bear their own cost.

{Ms. R.M Doshit, J.}

*Prakash**